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VIRGINIA LAW REGISTER

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The recent unseemly criticism by former President Roosevelt of the Supreme Court of the United States for two decisions rendered by that court affecting labor, has met with the well-merited disgust of all right-thinking men, and more especially lawyers and judges. This has come to be a pet habit of the only living Ex-President, and shows that his respect for the constitution stops whenever it comes in conflict with his personal aims and ambition. We presume that he knows the three great divisions of the Government are Legislative, Executive and Judicial, and that in no well-ordered republic can one safely encroach on the province of the other. *Ne sutor ultra crepidam* is as true now as when it was flung by the painter at the cobbler who attempted to become too didactic. Isn't it rather presumptuous, we ask, for a layman to pass a horseback opinion on the results of that great tribunal's deliberations, arrived at after long and mature consideration, as to what are the proper constitutional limitations upon state legislation? Very often, in pique and disappointment, the supporters of a movement or the advocates of a reform read into the careful judicial opinion of our courts a desire to frustrate all attempts in the direction of reform. They declare that the courts have said that reform in that direction is impossible, when, in fact, the courts have merely held that legislation must be constitutional. The adverse decisions of the courts regarding improper and *ultra vires* legislation are less a menace to popular government than winking at unconstitutional laws. If a proposed measure is not the one to bring about the desired reform without setting aside long-established principles of law or menacing the constitution, it is the plain duty of those interested in the passage of effective measures to devise another law that will stand the test. There are no conditions, however

bad, that will not yield to a proper employment of the legislative and executive machinery of the nation. The danger lies, not in the conservatism of the courts, but in headlong, half-baked attempts to effect reforms in spite of the constitution. From time to time remedial legislation aiming at the correction of abuses or hardships, is put through by enthusiasts or political and sociological reformers, that seems to them to fully cover the case under consideration; and they see in the passage of the act instant amelioration of conditions and relief from hardships. But when adjudicated by the highest authorities such legislation is found to be contrary to the basic principles of law and in direct conflict with the constitution. And it is only to a fearless, upright judiciary that the people can look for protection from the many absurd pieces of legislation enacted each year by legislatures, with but a vague idea as to what may be the ultimate outcome of such hasty, ill-considered statutes, if allowed to remain on the statute books.

Our Court of Appeals, by a majority of one, in the case of Chesapeake & Ohio Ry. Co. *v.* Paris, reported in this number with

**Stepping from Moving
Train as Negligence
Per Se.**

an annotation, seems to have made the act of alighting from a train that is perceptibly moving one of negligence per se, following the lead of the Wills Case decided shortly before

(see the September number of the REGISTER, p. 370, 68 S. E. 395). Judge Buchanan, who was absent when the Wills Case was decided, and Judge Whittle, who merely concurred in the result of that case, dissent here strongly, and we think they are right. It is regrettable that an act at which hardly one man in a thousand would hesitate, under the circumstances of being on the platform of a coach with the desire and right to get off, when the train started to move off, should be held negligence per se. It seems to be a jury question and a jury's verdict should not be set aside on the ground that such an act is negligence per se and a bar to any recovery although the railroad company had been negligent.

In the September number of the REGISTER (p. 385), we commented upon the case of *Wickham v. Green*, without being aware that a petition for a rehearing was pending in **Time of Filing** the case, but having thus commented, as we **Pleadings.**

should not have done had we known of the pending petition, we think it but fair that we should say that we have read the petition, and that it must be admitted that it makes a strong plea for at least a reconsideration of the case, if not a reversal. The strongest arguments brought out in the petition are, it seems to us: 1. The wide discretion given to the trial court by § 3293, and the presumption of correctness of its action upon the facts before it which should attend the exercise of such discretion, thus throwing the burden of showing error in such action upon the party alleging the same, to which the Court of Appeals failed to give proper effect when it, in effect, required of the plaintiff proof of the just cause or excuse for his delay in filing his declaration, instead of presuming the action of the trial court in allowing such filing after the time prescribed, but during the same term, to have been correct in the absence of any evidence to the contrary; 2. The fact that the reason given by the court in this case for reversing the action of the lower court in allowing the declaration to be filed, that is, that otherwise the defendant would be deprived of his right to plead the statute of limitations, was expressly stated in *Alvis v. Johnson*, 1 Va. Dec. 381, as a reason for reinstating the cause, as otherwise the plaintiff might have been debarred from the recovery of a just debt in a subsequent suit, by a plea of the statute of limitations; 3. The apparent general practice allowing the filing of the declaration at the following term, practically as a matter of course, see, for example, Barton's L. Pr., vol. 1, p. 284; 4. That the defendant had no "accrued right" to plead the statute of limitations until the court, under § 3293, had exercised its discretion in allowing or refusing a reinstatement or refusing or granting a dismissal of the suit, such action relating back to the first institution of the suit, but that the right did not accrue until the next term had passed without the declaration being filed or the suit reinstated; and, 5. The fact that this important question

was decided by a court consisting of three judges only. We would like to see these arguments met and disposed of before it is finally decided that this plaintiff has lost a right to recover upon a just cause of action.

This is a new system to be used in the trial of cases in the Moot Court of law schools. Under the system now in vogue in most

The Ewing System of Conducting Trials in the Moot Court of Law Schools. of the law schools of the country, a statement of all the facts of the case is supplied both the attorneys for the plaintiff and defendant, with the result that each side is thoroughly familiar with the details of the opponent's case. They are completely apprised in advance of all the difficulties with which they have to contend and are therefore enabled to so shape their own evidence and the testimony of their own witnesses to such an extent that the outcome of a trial depends solely upon the caliber of the particular attorney's imagination; all of which is totally at variance with the conditions met in a court of law. At no time in the real prosecution of a case does the attorney for the plaintiff or defendant know perfectly beforehand, the case against him; it is only the general proposition that he can have any knowledge of.

Learning his opponent's case bit by bit, by questions and answers, appreciating when to interrupt and object as the case unfolds, noting in passing what facts are to be controverted, what facts are to be overlooked, marshalling his own witnesses, and bringing out by a series of pertinent questions, the material facts of the case, is the real experience of the attorney in a trial of a case. It is this atmosphere and these surroundings from which the most valuable experience can be secured, and this system is designed to conform as nearly as possible to the actual conditions met with in a trial of a case in our courts.

In the working of the system it is contemplated, but not necessarily requisite, that all the members of the school will take part in the proceedings of the court and by these means actually ex-

perience, and become more familiar with, the handling of a case at a trial. The senior classes will in all cases be the attorneys of record, the members of the junior classes the witnesses in the case, and the freshmen or the lower classes serve as jurors. The "facts" of each case, all of the evidence and "knowledge of the witnesses," are printed on separate sheets of paper, bound together in the form of a tablet and are to be given only to those persons designated as the proper parties to receive them.

For instance, on sheets of paper marked "For the plaintiff's attorney" are printed the names of the parties in the case, all of the facts known to the plaintiff, a list of plaintiff's witnesses and an outline of their testimony and in regular form all the papers which may be offered in evidence by the plaintiff.

On succeeding sheets of paper marked "For the defendant's attorney" are printed the names of the parties, all of the facts of the case known to the defendant, a list of the defendant's witnesses and an outline of their testimony, and in regular form all the papers which may be used as evidence by the defendant.

Both the attorneys for the plaintiff and defendant should be instructed to detach from the sheets of paper supplied them, the exhibits, in order that the same may be offered separately in evidence and identified by witnesses from the marks on the margin.

On succeeding and separate sheets of paper each of which is marked for the various witnesses, are printed in sufficient detail all the facts of which that particular witness has any knowledge, with directions thereon to the witness in regard to the disclosing of the facts stated therein.

The actual workings of the system will be as follows:

The judge presiding at the Moot Court will assign those students who are to act as attorneys and note their names upon a memorandum supplied for that purpose. He will then tear from the tablet all those papers marked "For the plaintiff's attorney" and give them to the individual designated. He will then do the same in regard to the individual designated as defendant's attorney. He will next indicate those students who are to act as witnesses, note their names upon the same memorandum, tear from the tablet the sheets marked for the various witnesses and give them to the individuals designated.

The attorneys in each case must then proceed with all the necessary preliminary steps, bringing the matter to trial. The jury will be chosen in due form and all the preparations made, according to the Code provisions in effect in the particular locality. The plaintiff's attorney will then proceed with his case, calling as many of his witnesses as he cares to and in any order he thinks best; he may or not as he chooses offer in evidence the various exhibits. The defendant's attorney will then present his defense. Both attorneys may of course make the usual objections and motions and the same must be passed upon by the trial judge and a final disposition made of the case as in the regular practice.

An appellate court is optional, depending upon the extent to which the system is developed in the various schools.

As far as possible in each case, a short outline or history of the real case after which the particular case is modelled, will accompany the papers, from which by comparison at the close of the trial, the student attorneys may learn wherein their case was won or lost.

The success or failure of this system will depend to a very great extent upon the degree of interest and enthusiastic co-operation exercised by those students taking the part of the witnesses, and it should therefore be urged upon them, and they should be in some measure required to be thoroughly familiar with all the details supplied them in their memorandum, so that in answering the various questions put to them, they will not be at a loss for an answer or make a misstatement of facts.

Approximately one hundred of these cases will be prepared, modelled after reported cases, each one of which will have as its main, or turning point, the application of a settled proposition of law. Suggestions are invited, to the end that improvements may be made in the preparation of these cases.

The charge for each of these cases, which must be ordered in lots of twenty-five, will be \$2.00 per case, which charge it is suggested, should be borne by the students taking the parts of the attorneys.